DYNASTY RANGERS (M) SDN BHD

v.

SBSK PLANTATIONS SDN BHD

HIGH COURT MALAYA, IPOH
SU GEOK YIAM JC
[CIVIL SUIT NO: 22-97-2000]
20 JUNE 2001

CIVIL PROCEDURE: *Mareva Injunction - Factors to be considered - Grounds of good arguable case and real risk that assets may be dissipated or removed - Whether balance of convenience favoured granting of injunction - Whether there was inordinate delay in application for injunction*

The plaintiff had entered into a Time Charter with Perak Meat Industries Sdn Bhd ("PMI") and Exportlink Pty Ltd ("EPL"). Subsequent to the failure of PMI and EPL to provide a bank guarantee to the plaintiff, the defendant gave a corporate guarantee to the plaintiff thereby guaranteeing all responsibilities and obligations of PMI and EPL as stipulated in the Time Charter. On the basis of the corporate guarantee, the plaintiff caused a vessel to be delivered to PMI and EPL for their use. However, as a result of the wrongful repudiation of the Time Charter by PMI and EPL in failing to pay the requisite hire charges punctually, the plaintiff eventually made losses. The plaintiff then successfully obtained an award from the arbitrators for the losses incurred, and subsequently filed *vide* a summons in chambers for a Mareva injunction to restrain the defendant from removing out of the jurisdiction of the court or disposing within the jurisdiction of the court, the assets belonging to the defendant. The application was dismissed and hence, this appeal.

In this present proceedings, in order for the plaintiff to succeed in its application for a Mareva injunction, it is necessary for the plaintiff to prove that: (i) the plaintiff has a good arguable case against the defendant; (ii) the defendant has assets within the jurisdiction of the court; (iii) there is a real risk that the defendant may dissipate or remove its assets; (iv) the balance of convenience favours the grant of the injunction; and (v) the plaintiff has not been guilty of delay in applying for the injunction.

Held:

[1] Although there is nothing in the corporate guarantee which expressly provides that the defendant is bound by the arbitration award, the plaintiff has shown a good arguable case against the defendant for the amount as claimed; based on the pleadings, the affidavit evidence of

the plaintiff and the defendant, and in the light of decided cases *viz*; *The "Vasso"* and *Compania Sudamericana de Fletes S.A. v. African Continental Bank Ltd.,The Rosarina*.

[2] Based on the audited accounts as exhibited by the defendant, it is clear that the defendant has assets within the jurisdiction of the court, *ie* meaning; there are assets belonging to the defendant which the Mareva can freeze.

[3] The fundamental aim of the Mareva is to prevent the defendant from frustrating any judgment that may be obtained by the dissipation of its assets. In this instance, however, the court is not satisfied on the available evidence that there is dishonesty and a lack of probity on the part of PMI and EPL. It is clear from the plaintiff's affidavit evidence that PMI and EPL are not in a financial position to pay the arbitration award. Neither has the plaintiff shown by affidavit evidence, that PMI and EPL have assets to pay the arbitration award. The fact that the debtor is impecunious does not make the debtor dishonest. Nor does the refusal of the debtor to pay its debts render its conduct dishonest or lacking in probity.

[3a] The facts show that PMI had defaulted on the Time Charter in 1997, while the dispute had been referred to arbitration in 1998. There is no real evidence that the defendant has dissipated its assets although it had ample time and opportunity to do so. On the contrary, the net assets of the defendant, as disclosed in the defendant's audited accounts, have increased between the years 1998 and 1999. Further, the shares which form the assets of the defendant are pledged to the bank. There is, therefore, no risk of the defendant disposing of the shares as they are encumbered.

[3b] As the plaintiff has failed to satisfy the court that there is a real risk that the defendant will dissipate its assets, the grant of a Mareva injunction would cause oppression to the defendant, as it would interfere with the ordinary business of the defendant. A Mareva injunction should not be used as an instrument of oppression.

[4] Applying the well established principles of law to the facts of the present case, it would be unjust to grant the Mareva injunction as the balance of convenience favours the defendant.

[5] There has been delay on the part of the plaintiff in applying for the Mareva injunction. The Mareva was only applied six months after the commencement of the writ action (which was filed before the arbitrators

handed down the award) by the plaintiff. This delay has not been explained and is in the circumstances of the case, inordinate, because the application should have been made at the very latest, at the time of the filing of the writ.

[5a] Furthermore, all the circumstances relied on by the plaintiff as constituting evidence of a real risk of dissipation occurred in 1998, 1999 and 2000 and yet the plaintiff only applied for the Mareva injunction in October 2000. No satisfactory explanation was given by the plaintiff for its failure to act promptly.

[Plaintiff's application dismissed with costs.]

Case(s) referred to:

Alor Janggus Soon Seng Trading Sdn Bhd v. Sey Hoe Sdn Bhd [1995] 1 CLJ 461 ***(foll)***

American Cyanamid Co v. Ethicon Ltd [1975] 1 All ER 504 ***(refd)***

Amixco Asia Pte Ltd v. Bank Negara Indonesia [1992] 1 SLR 703 ***(not foll)***

Ang Chee Huat v. Engelbach Thomas Joseph [1995] 2 CLJ 893 ***(not foll)***

Art Trend Ltd v. Blue Dolphin (Pte) Ltd [1983] 1 CLJ 342; [1983] 1 CLJ (Rep) 985 ***(foll)***

Bakarim v. Victoria P Shipping Co Ltd, The Tatiangela [1980] 2 Lloyd's Rep 193 ***(refd)***

Bank Bumiputra (M) Bhd v. Lorrain Osman & Ors [1986] 2 MLJ 236 ***(dist)***

Barclay-Johnson v. Yuill [1980] 3 All ER 190 ***(refd)***

Bremer Oeltransport GmbH v. Drewry [1933] 1 KB 753 ***(refd)***

Compania Sudamericana de Fletes S.A. v. African Continental Bank Ltd, The Rosarina [1973] Lloyd's Rep 21 ***(foll)***

Creative Furnishing Sdn Bhd v. Wong Koi [1989] 2 CLJ 93; [1989] 1 CLJ (Rep) 22 ***(foll)***

European Grain & Shipping Ltd v. Compania Naviera SA & Ors [1990] 2 MLJ 291 ***(refd)***

Farey Jones (Insurance) Ltd v. IFM Funding GmbH [1979] CA Transcript 223 ***(refd)***

Heng Holdings SEA (Pte) Ltd v. Tomongo Shipping Co Ltd [1997] 3 SLR 547 ***(foll)***

Hj Wan Habib Syed Mahmud v. Datuk Patinggi Hj Abdul Taib Mahmud [1986] 2 MLJ 198 ***(refd)***

Larut Consolidated Bhd v. Khoo Ee Bee [1997] 5 CLJ 307 ***(foll)***

Meespierson NV v. Industrial and Commercial Bank of Vietnam [1998] 2 SLR 632 ***(refd)***

Montecchi v. Shimco (UK) Ltd [1971] WLR 1180 ***(refd)***

Ninemia Corp v. Trave Schiffharts [1984] 1 All ER 398 ***(refd)***

Noor Johan Abdul Wahab v. Md Yusoff Aman Shah & Anor [1994] 2 CLJ 249 ***(refd)***

Pacific Center Sdn. Bhd. v. United Engineers (Malaysia) Bhd [1984] 2 MLJ 143 ***(foll)***

Pek Seng Co Pte Ltd & Ors v. Low Tin Kee & Ors [1990] 1 MLJ 75 ***(not foll)***

Petowa Jaya Sdn Bhd v. Binaan Nasional Sdn Bhd [1988] 2 MLJ 261 ***(not foll)***

Petromar Energy Resources Pte Ltd v. Glencore International AG [1999] 2 SLR 609 ***(refd)***

Prince Abdul Rahman Bin Turki Al Sudairy v. Abu-Taha [1980] 3 All ER 409 ***(refd)***
Rasu Maritima SA v. Perusahaan Pertambangan Minyak dan Gas Bumi Negara (Pertamina) and Government of Indonesia (as interveners) [1977] 3 All ER 324 ***(refd)***
Re Kitchin, ex p Young [1881] 17 Ch D 668 ***(refd)***
S & F International Limited v. Tans-Con Engieering Sdn Bhd [1985] 1 MLJ 62 ***(foll)***
Sunrise Sdn Bhd v. First Profile (M) Sdn Bhd [1997] 1 CLJ 529 ***(not foll)***
Tansa Enterprise Sdn Bhd v. Temenang Engineering Sdn Bhd [1994] 2 MLJ 253 ***(refd)***
The "Vasso" [1979] 2 QB (Com Court) 412 ***(foll)***
Trade Alliance (S) Pte Ltd v. Sujinder Electronics (Imp & Exp) Pte Ltd (unreported) 118 MDZ ***(foll)***
Tsoi Ping Kwan v. Loh Lai Ngoh [1997] 3 CLJ 552 ***(foll)***
Vitkovice Hornia Hutni Tezirstvo v. Korner [1951] 2 All ER 334 ***(refd)***
Z Ltd v. A [1982] 1 All ER 556 ***(refd)***
Zainal Abidin Hj Abdul Rahman v. Century Hotel Sdn Bhd [1982] 1 MLJ 261 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 14

Supreme Court of Judicature (Consolidation) Act 1925 [UK], s. 45

Other source(s) referred to:
Halsbury's Laws of England, Reissue, 4th edn, vol 20, pp 115, 118, paras 18, 184,
Stroud's Judicial Dictionary of Words and Phrases, 6th edn, vol 2, p 1111
The Concise Oxford Dictionary, 9th edn, pp 938, 1173

For the plaintiff - A Mahendran (KL Wong); M/s Mahendran & Co
For the defendant - Arun Krishnalingam (SS Soo); M/s Shearn Delamore & Co

Reported by Raja Vishnu Sivarajah

JUDGMENT

Su Geok Yiam JC:

This is an appeal against my decision dismissing the plaintiff's application *vide* a summons in chambers (enc. 13) for a Mareva injunction to restrain the defendant from removing out of the jurisdiction of the court or disposing within the jurisdiction of the court its assets exceeding the sum of RM12,099,825.17.

Facts And Background

The plaintiff and the defendant are both private limited companies incorporated in Malaysia under the Companies Act 1965. The plaintiff is also the registered owner of a vessel known as "Pera Ranger" ("the Vessel"). The registered

address of the plaintiff is at Unit 20-03, 20th Floor, Menara Promet, Jalan Sultan Ismail, 50250 Kuala Lumpur. The registered address of the defendant is at No. 21 and 23 (Ground Floor), Jalan Hussein, 30250 lpoh, Perak.

On 14 February 1997, Perak Freight Services Sdn Bhd ("PFS"), a private limited company also incorporated in Malaysia, entered into a Time Charter ("the Time Charter") with two other private limited companies, Perak Meat Industries Sdn Bhd, a local company ("PMI") and Exportlink Pty Ltd of Perth, W.A., a foreign company ("EPL"), both subsidiary companies of the defendant, whereby the former agreed to charter out the vessel to the latter for a term of five years subject to the terms and conditions as stated in the Time Charter.

Subsequently, by a letter dated 23 June 1997, PFS gave notice to PMI and EPL to assign its rights, interests and obligations under the Time Charter to the plaintiff.

One of the clauses of the Time Charter, cl. 5, required PMI and EPL to provide a continuing bank guarantee for a sum of RM1,531,350 equivalent to 90 days hire which shall be maintained by PMI and EPL for the duration of the Time Charter, ie, five years.

However, as it turned out, PMI and EPL were only able to furnish to the plaintiff a three month bank guarantee dated 28 April 1997 which expired on 26 July 1997. By virtue of the failure of PMI and EPL to furnish a fresh bank guarantee to the plaintiff, the plaintiff refused to release the vessel to PMI and EPL. The latter than proposed to the plaintiff to accept a corporate guarantee to be issued by the defendant. The plaintiff alleged that it had no choice but to accept it since a fresh bank guarantee could not be obtained. As a result of this, the defendant which is the holding company of PMI and EPL came to the rescue of PMI and EPL and on 1 August 1997 the defendant gave a corporate guarantee ("the corporate guarantee") to the plaintiff under which it unconditionally guaranteed that in the event PMI and EPL failed to provide the requisite guarantee as stipulated in cl. 5 of the Time Charter the defendant guaranteed the fulfillment of all responsibilities and obligations of PMI and EPL as stipulated in the Time Charter until such time as the requisite bank guarantee was furnished to the plaintiff whereupon the corporate guarantee would expire and be of no further effect.

On the basis of the corporate guarantee the plaintiff duly caused the vessel to be delivered to PMI and EPL on 7 August 1997 for their use under the Time Charter.

Thereafter, no bank guarantee was furnished until almost eighteen months later, on 21 August 1999, when the then solicitors of PMI and EPL delivered to

the plaintiff's then solicitors, a Maybank guarantee dated 20 August 1999 ("the Maybank guarantee") for the sum of RM1,531,350 in an alleged attempt to discharge the obligations and responsibilities of the defendant under the corporate guarantee.

By which time the plaintiff had already withdrawn the Vessel thereby terminating the Time Charter. The plaintiff has alleged that since the liability of the defendant under the corporate guarantee had crystallised before the Maybank guarantee was furnished to the plaintiff, the Maybank guarantee is inoperative as far as this writ action is concerned.

The Vessel had in fact been withdrawn on 17 January 1998 when the plaintiff gave notice by letter to PMI and EPL for such withdrawal arising from their alleged breach and/or repudiation of the Time Charter by failing to pay to the plaintiff the daily hire of RM17,015 comprising a sum of RM13,500 being the daily hire and a sum of RM3,525 being the cost of fuel and port charges wef 7 August 1997 punctually as per the Time Charter, ie, monthly in advance, and to issue further voyage instructions. It is the plaintiff's contention that although PMI and EPL had used the Vessel for two voyages and had the use of the Vessel for about six months, they had only paid a total of RM106,025.42 of the daily hire.

As the plaintiff had lost the benefit of the Time Charter and also lost the revenue they would otherwise have received under the Time Charter, the plaintiff claimed against PMI and EPL for, *inter alia*, the following:

(a) an outstanding sum of RM1,711,070.31 (which is not disputed) being arrears of hire charges (excluding fuel) due and payable to the plaintiff under cl. 3 of the Time Charter calculated up to the date of the withdrawal of the Vessel on 17 January 1998;

(b) an outstanding sum of RM1,209,109.44 being accrued interest calculated from the due date up to 30 September 1999;

(c) a sum of RM80,714 being cash outlays consequential upon withdrawal and lay-up of the Vessel; and

(d) loss of profit consequential from the wrongful repudiation of the Time Charter.

In accordance with the provisions of the Time Charter the plaintiff's claim against PMI and EPL was referred for arbitration.

On 12 April 2000, before the arbitrators handed down their award, the plaintiff filed this writ action (encl. 1) claiming against the defendant the following:

(a) the sum of RM1,711,070.31 being arrears of hire payable calculated up to 17 January 1998;

(b) a sum of RM1,209,109.46 being accrued interest as at 30 September 1999;

(c) interest on the sum of RM2,920,180 at the rate of 0.1% daily from 1 October 1999 until date of full payment;

(d) a sum of RM80,714 as damages for the cash outlays consequential upon withdrawal and lay-up of the Vessel;

(e) a sum of RM13,187,000 as damages for loss of profit consequent from the wrongful repudiation of the Time Charter;

(f) in the alternative, the sum handed down by the arbitrators against PMI and EPL;

(g) costs on a solicitors and client basis; and

(h) further or other relief as deemed fit by the court;

on the ground that the defendant is liable to the plaintiff under the corporate guarantee for the losses incurred by the plaintiff as a result of the wrongful repudiation of the Time Charter by PMI and EPL in failing to pay the requisite hire charges punctually as per the Time Charter.

On 31 May 2000, the arbitrators adjudged and directed that PMI and EPL do pay the plaintiff the sum of RM12,099,825.17 and that PMI's and EPL's counterclaim for USD19,000,000 for the wrongful withdrawal of the Vessel be dismissed.

The sum of RM12,099,825.17 comprised the following:

(a) the sum of RM1,711,070.31 being arrears of hire charges due and payable to the plaintiff under the Time Charter calculated up to the date of the withdrawal of the Vessel on 17 January 1998;

(b) the sum of RM80,714 being cash outlays consequential upon withdrawal and lay-up of the Vessel;

(c) a sum of RM9,712,279.00 being the loss of profit; and

(d) a sum of RM572,965.13 being accrued interest on the sum of RM1,711,070.31 at the rate of 12.2.% per annum calculated up to 31 May 2000.

The Plaintiff's Application For A Mareva Injunction

On 21 August 2000, the plaintiff filed the summons in chambers (encl. 13) for a Mareva injunction to restrain the defendant from removing out of the jurisdiction of the court or disposing within the jurisdiction of the court, its assets exceeding the sum of RM12,099,825.17.

The plaintiff has relied on the following grounds:

(a) that the plaintiff has a good arguable case against the defendant and there is no factual dispute in this action since the issues involved are questions of law which concern the interpretation of the corporate guarantee;

(b) that the plaintiff will suffer irreparable damage if at the hearing/trial of this action, judgment were to be awarded in favour of the plaintiff and the defendant has no disposable assets to meet the plaintiff's claim;

(c) that there is a real risk that the defendant may have no sufficient disposable assets to meet the plaintiff's claim because they had failed and/or refused to disclose its assets or value, despite repeated requests and/or reminders;

(d) that if the orders as prayed for by the plaintiff were granted, the defendant will not suffer any hardship which cannot be compensated with damages as the plaintiff is prepared to give such undertaking; and

(e) such other grounds as are stated in the affidavit of Amin Halim Rasip affirmed on 21 August 2000.

Essential Ingredients For The Grant Of A Mareva Injunction

In order for the plaintiff to succeed in its application for a Mareva injunction, it is settled law that it is necessary for the plaintiff to prove the following:

(1) that the plaintiff has a good arguable case against the defendant;

(2) that the defendant has assets within the jurisdiction of the court;

(3) that there is a real risk that the defendant will or may dissipate or remove its assets so as to render them unavailable or untraceable in order to frustrate any judgment which may be obtained by the plaintiff against the defendant in the writ action;

(4) that the balance of convenience favours the grant of a Mareva injunction; and

(5) that the plaintiff has not been guilty of delay in applying for the Mareva injunction.

Whether Plaintiff Has A Good Arguable Case

The Law

The birthplace of the Mareva injunction is none other than England. Therefore, I shall deal with the law in England first.

In *Ninemia Corp v. Trave Schiffharts* [1984] 1 All ER 398, at p. 402, his Lordship Mustill J believed that it is not open to dispute that "the judge hearing a Mareva application is not only entitled but bound to make some assessment of the plaintiff's chance of success at the trial". He considered the following cases which were cited in argument, *viz Rasu Maritima SA v. Perusahaan Pertambangan Minyak dan Gas Bumi Negara (Pertamina) and Government of Indonesia (as interveners)* [1977] 3 All ER 324, [1978] QB 644; *Z Ltd v. A* [1982] 1 All ER 556, [1982] QB 558; *American Cyanamid Co v. Ethicon Ltd* [1975] 1 All ER 504, [1975] AC 396; *Vitkovice Hornia Hutni Tezirstvo v. Korner* [1951] 2 All ER 334, [1951] AC 869; *Farey Jones (Insurance) Ltd v. IFM Funding GmbH* [1979] CA Transcript 223; *Bakarim v. Victoria P Shipping Co Ltd, The Tatiangela* [1980] 2 Lloyd's Rep 193.

At para j on the same page right until para g on the following p. 403 his Lordship Mustill J said as follows:

> These cases are not easily reconciled, but to my mind they established that the strength of the plaintiff's case is relevant in two distinct respects: (1) the plaintiff must have a case of a certain strength, before the question of granting Mareva relief can arise at all. I will call this the 'threshold'; (2) even where the plaintiff shows that he has a case which reaches the threshold, the strength of his case is to be weighed in the balance with other factors relevant to the exercise of the discretion. It seems to me plain that the second proposition is justified by common sense and by the authorities. It is the first which raises problems. There are only two direct authorities on the location of the threshold. The first is the judgment of Lord Denning MR in the *Pertamina* case, and the second that of Kerr LJ in *Z Ltd v. A.* In the former case Lord Denning MR said ([1977] 3 All ER 324, [1978] QB 644 at 661):
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> > So I would hold that an order restraining removal of assets can be made whenever the plaintiff can show that he has a "good arguable case". That is a test applied for service on a defendant out of the jurisdiction: see *Vitkovice Horni a Hutni Tezirstvo v. Korner*; and it is a good test in this procedure which is appropriate when defendants are out of the jurisdiction. It is also in conformity with the test as to the granting of injunctions whenever it is just and convenient as laid down by the House of Lords in *American Cyanamid Co v. Ethicon Ltd.*

> This passage calls up two lines of authority. One relates to the general principles governing the grant of interlocutory injunctions. With great respect, I see real difficulties here. In the ordinary way, a plaintiff seeks an interlocutory injunction for the purpose of holding until trial the substantive relief which he hopes to obtain on final judgment. The interlocutory injunction is a direct reflection of his cause of action. The relief granted on a Mareva application is of a quite different character. It bears no relation to the relief granted at the trial. The plaintiff, however successful at the trial, will not obtain a perpetual injunction in terms of the interlocutory Mareva injunction. The latter bears on assets which in the great majority of cases have no connection at all with the cause of action on which the injunction is founded.
>
> Moreover, even if the analogy with ordinary interlocutory injunctions were accepted, it would not lead to 'a good arguable case' as the test. The *Cyanamid* case teaches that the court should not attempt to weigh the merits except to ascertain at the outset that the plaintiff's case is not derisory, and then to employ it as a factor of last resort if all other considerations are equal. The standard of 'a good arguable case' seems to have no place here.
>
> The analogy with proceedings under RSC Ord II also seems rather distant. It is true that the service of a writ out of the jurisdiction commands a foreigner to appear, against his will. But he need not comply, if he does not choose. The Mareva injunction, by contrast, bites directly on the defendant's assets; he must come in and defend, or lose them. Moreover, it is now the law, which was not so when the *Pertamina* case was decided, that the Mareva injunction applies to persons resident in the United Kingdom, so the relationship with Ord II seems even more remote.
>
> Nevertheless, the *Pertamina* case is the foundation authority, and the test of a 'good arguable case' was adopted by the Court of Appeal in *Farey-Jones (Insurance,) Ltd v. IFM Funding GmbH* [1979] CA Transcript 223 so it seems appropriate to adopt it here. But what exactly does the expression mean?

After considering the House of Lords' decision in the *Korner* case *(supra)* and his Lordship Eveleigh LJ's decision in *Z Ltd v. A (supra)* he concluded as follows in para. d at p. 404:

> In these circumstances I consider that the right course is to adopt the test of the good arguable case, in the sense of a case, which is more than barely capable of serious argument, and yet not necessarily one which the judge believes to have a better than 50% chance of success.

At the end of the trial his Lordship Mustill J ordered the discharge of the injunction. He gave leave to appeal and ordered the injunction to remain in force pending appeal.

In dismissing the appeal, his Lordship Kerr LJ who delivered the judgment of the Court of Appeal held in respect of the first question posed by Mustill J as follows (on p. 415, para. d):

> A 'good arguable case' is no doubt the minimum which the plaintiff must show in order to cross what the judge rightly described as the 'threshold' for the exercise of the jurisdiction. But at the end of the day the court must consider the evidence as a whole in deciding whether or not to exercise this statutory jurisdiction.

and in respect of the second question posed by Mustill J as follows (on p. 410, para. h):

> In our view the test is whether, on the assumption that the plaintiff has shown at least 'a good arguable case', the court concludes on the whole of the evidence then before it, that the refusal of a Mareva injunction would involve a real risk that a judgment or award in favour of the plaintiff would remain unsatisfied.

His Lordship Kerr LJ concluded as follows (on p. 422, paras. e to h):

> On the present appeal we have been mainly concerned with the tests to be applied in answering the two questions posed by the judge. However, other matters may often also have to be borne in mind. The ultimate test for the exercise of the jurisdiction is whether, in all the circumstances, the case is one in which it appears to the court 'to be just and convenient' to grant the injunction: see s. 37 of the Supreme Court 1981 which we have already set out. Thus, the conduct of the plaintiff may be material, and the rights of any third parties who may be affected by the grant of an injunction may often also have to be borne in mind: see *Galaxia Maritime SA Mineralimportexport, The Eleftherios* [1981] 1 All ER 796, [1982] 1 WLR 539. Further, it must always be remembered that if, or to the extent, that, the grant of a Mareva injunction inflicts hardship on the defendant, his legitimate interests must prevail over those of the plaintiff, who seeks to obtain security for a claim which may appear to be well founded but which still remains to be established at the trial. There is no need to repeat here what was said in that connection in *Z Ltd v. A* [1982] 1 All ER 556 at 571-572, [1982] QB 558 at 585-586. If the plaintiff is in a position to contend that his claim is not open to doubt, then he must satisfy the requirements of an application for summary judgment under RSC Order 14. But if he applies for a Mareva injunction on the ground that he has 'a good arguable case', then the balance should be weighed as we have indicated above.
>
> In the present case the judge correctly applied the two tests, which fell to be considered on the facts, and there is no basis for criticizing the conclusion, which he reached in exercising his discretion. Accordingly, this appeal must be dismissed.

In Malaysia, the Federal Court in the case of *Zainal Abidin Hj Abdul Rahman v. Century Hotel Sdn Bhd* [1982] 1 MLJ 261 held that the High Court in Malaysia has jurisdiction to grant a Mareva injunction in appropriate

circumstances as the provisions of para. 6 of the schedule to the Courts of Judicature Act 1964 are the equivalent of the provisions of s. 45 of the English Supreme Court of Judicature (Consolidation) Act 1925. However, on the facts of the case, the Federal Court refused to grant the Mareva injunction because although the appellant had raised a serious question to be tried on the question of the damage he has suffered by reason of the alleged wrongful repudiation of the lease agreement, there was no evidence to show that there was a danger that the available assets of the respondent would be dissipated to prejudice the appellant's claim.

Three years later, in the case of *S & F International Limited v. Tans-Con Engieering Sdn Bhd* [1985] 1 MLJ 62, the Federal Court dismissed an appeal against the order of the learned High Court judge granting a Mareva injunction in favour of the respondent on the ground that the latter was satisfied on a consideration of the affidavit evidence that the respondent had in fact a strong arguable case in relation to the claim for moneys due and payable in the sum of $2,025,822.40 and that there was a risk of dissipation of the appellant's asset, particularly in the light of the fact that its corporate structure inferred that it was not to be relied upon.

The plaintiff's Case

The plaintiff has established at the very minimum a good arguable case in order to satisfy the first condition for the granting of a Mareva injunction. Based on the affidavit evidence the plaintiff had *vide* its letter of demand dated 10 December 1999 made a call on the defendant for payment under the corporate guarantee for a sum of RM16,187,893.77 (exh. "A20" of the plaintiff's affidavit affirmed on 21 August 2000 (encl. 6)). The defendant had refused to pay.

After the arbitrators had handed down its award of RM12,099,825.17 the plaintiff had also *vide* its letter dated 4 August 2000 (exh. "DRSB21" of the plaintiff's affidavit affirmed on 4 October 2000 (encl. 14)) demanded for payment from the defendant and requested the defendant to disclose the existence and value of its disposable assets to meet the plaintiff's claim against the defendant under the corporate guarantee.

The defendant had refused to pay or to disclose the existence and value of its disposable assets to satisfy its liabilities to the plaintiff under the corporate guarantee.

In order to demonstrate to the court that the plaintiff has a good arguable case against the defendant, KL Wong, the learned plaintiff's counsel, has relied extensively on the terms of the corporate guarantee, cll. 3 and 5 of the Time Charter and the arbitration award handed down by the arbitrators against PMI

and EPL for the sum of RM12,099,825.17. He has cited the Malaysian cases of *S & F International Ltd v. Trans-con Engineering Sdn Bhd (supra)* and *Tansa Enterprise Sdn Bhd v. Temenang Engineering Sdn Bhd* [1994] 2 MLJ 253 to support his proposition that a good arguable case is one which is more than being barely capable of serious argument and not necessarily one that the judge believes has got more than a 50% chance of success.

The Defendant's Case

In reply, Arun Krishnalingam, the learned counsel for the defendant, has submitted that it is insufficient to wave the award of RM12.1 million before the court. The plaintiff must go further to show that the defendant is liable under the corporate guarantee because the handing down of the arbitration award against PMI and EPL does not automatically mean that the plaintiff has a good arguable case against the defendant. He has relied on two English cases, *viz* in *Re Kitchin, ex p Young* [1881] 17 Ch D 668 and *The "Vasso"* [1979] 2 QB (Com. Court) 412 to support the defendant's contentions.

In the first case, the English Court of Appeal was asked to hold that one Kitchin, the guarantor, was liable to pay any sum which an arbitrator shall say is the amount of damages for the principal debtor's breach of agreement. His Lordship James LJ sitting in the English Court of Appeal declined to do so on the ground that the guarantee must be expressed in very clear words before he could assent to a construction which might lead to the grossest injustice.

At p. 672, he has this to say about the effect of an arbitration award against a guarantor:

> The arbitration is a proceeding to which he is no party; it is a proceeding between the creditor and the person who is alleged to have broken his contract, and if the surety is bound by it, any letter which the principal debtor had written, any expression he had used, or any step he had taken in the arbitration would be binding upon the surety. The principal debtor might entirely neglect to defend the surety properly in the arbitration; he might make admissions of various things which would be binding as against him, but which would not, in the absence of agreement, be binding as against the surety. It would be monstrous that a man who is not bound by any admission of the principal debtor, should be bound by an agreement between the creditor and the principal debtor as to the mode in which the liability should be ascertained. That is enough to dispose of the case.

Further at pp. 673 and 674, his brother judge, Lush LJ has this to say about a guarantee that does not say a word about paying anything:

> What he says is, 'I undertake and guarantee that all wines supplied to them by you shall be duly paid for.' Now, suppose the dispute between the parties

was whether a given amount was due for wine; supposing the creditors had brought an action against the debtors, and had proved before a jury, and had got a verdict for a given amount as being the debt due to them for wines supplied, and they had then brought an action against the surety upon this guarantee, that verdict would have been no evidence against the surety of the amount due for wines. The creditors must have proved it over again against the surety, because he is not bound by any admissions or statements of the principal as to what amount is due. He is only bound to pay the amount which shall be proved against him. In such a case as that, the verdict would have been no evidence at all, except to show what the amount of the verdict was. It would have been no evidence of the surety's liability to pay that amount. Then we go on to the next clause: 'I undertake and guarantee that the agreement shall be otherwise duly performed in all respects.' That is all. *He does not say a word about paying anything. That is left to the proper legal conclusion. He would have to pay damages for the breach of the contract by the new firm. How are those damages to be assessed? Why, in the same way as the debt would have to be assessed if the claim were to wine supplied. You must find explicit words to make a person liable to pay any amount which may be awarded against a third person, whether it be by a jury, or a Judge, or an arbitrator*. That is not the natural construction of the words of this guarantee nor the usual form; for, as I have already said, I never saw a guarantee which contained such words. (Emphasis added.)

In the second case of *The Vasso (supra)*, the defendant had been sued by the plaintiff based on a personal guarantee which he had given to the plaintiff. The plaintiff had sold their vessel to one Astrofeliz and the vessel was then leased back under a time charter. The defendant had guaranteed the due performance and obligations of Astrofeliz. The guarantee was set out on a single piece of paper on the writing paper of the defendant, not unlike the corporate guarantee in this case.

It reads as follows (on p. 415 bottom right hand column and on p. 416, top left hand column):

THIS AGREEMENT is made the 18th day of July, 1972, between EMMANUEL MINOS JOHN COLOCOTRONIS of London, 149, Leadenhall Street, London, E.C.3 ("the Guarantor") and W. BRUNS & COMPANY of Hamburg 1, Fruchthof ("Bruns") and is supplementary to a Memorandum of Agreement for sale and a Time Charter of m.v. "BRUNSDEICH" to be renamed "VASSO" and Addendum thereto all of 30th June, 1972 ("The Agreements").

1. THE Guarantor guarantees and undertakes to procure the due performance and payment by the Owners of the m.v. "BRUNSDEICH" to be renamed "VASSO" ("Owners") of all liabilities and obligations of the Owners arising under or out of the Agreements.

2. THIS Agreement shall be governed by English law.

It was then signed by the defendant and his signature was witnessed.

His Lordship Robert Goff J held, following the case of *Re Kitchin (supra)*, that it was well established that general conditions in a guarantee guaranteeing the due performance of all the obligations of the principal debtor did not of themselves have the effect that the surety was bound by an arbitration award between the principal debtor and creditor even where the arbitration award arose out of an arbitration clause in the contract containing the obligations of the principal debtor guaranteed by the surety.

It is however, noteworthy, that the learned judge consequently held that the guarantee had to be construed in its context and as a matter of construction of the guarantee, the plaintiff was entitled to enforce the guarantee which had been provided by the defendant in consideration of the completion by the plaintiff of the sale contract. Having construed the relevant provisions of the addendum to the sale contract, the learned judge held that the plaintiff was entitled to judgment against the defendant under the guarantee in the sum of $1,069,917.66. Coincidentally, this was the very sum which had been adjudged by the arbitrators but a sum of British Pound 1,000 representing the arbitration fee which the plaintiff had to pay to take up the award was disallowed.

The Findings Of The Court

In the present case the court notes that although the plaintiff had applied for summary judgment *vide* its summons in chambers (encl. 5) filed on 29 August 2000 the application had yet to be heard by the learned deputy registrar when encl. 13 came up for hearing because of the defendant's application for a stay of proceedings (encl. 9) which needed to be heard first. Enclose 9 is the defendant's application to stay the proceedings pending the outcome of a Notice of Originating Motion No. R1-25-73-2000 filed by PMI and EPU at the Kuala Lumpur High Court to set aside the arbitration award.

Although the facts of the *S & F International* and *Tansa Enterprise* cases *(supra)* are similar to one and another and are distinguishable from the facts in the present case because in the two cases cited, the respective defendant is the principal debtor whereas in the present case the defendant is the guarantor, the principle of law applicable is the same, ie whether the plaintiff has shown a good arguable case against the defendant for the amount claimed, ie RM12.1 million.

In the first case the defendant had entered into a contract with the national electricity board for the installation of electricity transmission lines in Perak and Kelantan. As the main contractor, it then sub contracted the execution of certain works and services relating to the installation of the transmission lines

to the plaintiff. The plaintiff claimed the sum of $2,025,822.40 as the amount due and payable under the sub contract and this claim was supported by invoices.

In the second case, the defendant was the main contractor in a project. It had entered into a contract with the plaintiff for goods (bricks) sold and delivered to the defendant for use in the project. The plaintiff had successfully obtained summary judgment against the defendant for the sum of RM163,585.41 before applying for the Mareva injunction.

In the present case it is not disputed that the defendant is a guarantor under a corporate guarantee for PMI and EPL, the charterers of the Vessel, under the Time Charter.

In view of the first ground relied upon by the plaintiff, ie that the plaintiff has a good arguable case against the defendant and there is no factual dispute since the issues involved are questions of law which concern the interpretation of the corporate guarantee, the court will have to by necessity attempt to construe the general effect of the provisions of the corporate guarantee in relation to the provisions of the Time Charter without going into the merits of the plaintiff's claim.

The corporate guarantee provides as follows:

> 1st August 1997
>
> Dynasty Rangers (M) Sdn. Bhd.
> Lot No. 1, Lumut Industrial Park
> Jalan Kg. Acheh
> 32000 Sitiawan,
> Perak
>
> (Attn. Stuart Forbes)
>
> Dear Sirs,
>
> **REF: TIME CHARTER DATED 14TH FEBRUARY 1997 BETWEEN PERAK FREIGHT SERVICES SDN. BHD. AND PERAK MEAT INDUSTRIES SDN. BHD. & EXPORT LINK PTY. LTD.**
>
> Pursuant to the above time Time Charter which has been assigned to Dynasty Rangers (M) Sdn. Bhd. ("DRSB"), we **hereby unconditionally guarantee** that in the event Perak Meat Industries Sdn. Bhd. ("PMI") and/or Exportlink Pty. Ltd. ("EPL") fail to provide the requisite guarantee as stipulated in Clause 5 of the Time Charter upon the expiry of the current guarantee Issued by MBF Finance Bhd. ("Bank") on the 28th April 1997, we hereby guarantee **the fulfillment of all responsibilities and obligations of PMI or/and EPL as stipulated in the Time Charter until such** time as the requisite valid guarantee

issued in favour of DRSB is obtained by PMI and/or EPL and furnished to DRSB. This corporate guarantee shall then expire and be of no further effect.

Yours sincerely,
SBSK PLANTATIONS SDN. BHD.

Sgd.

DATO' SHAMSUL BAHARI B. SALLEH KHIR
CHAIRMAN (Emphasis added.)

The word "obligation" is given, *inter alia*, the following meaning in *The Concise Oxford Dictionary*, 9th edn, at p. 938:

a binding agreement, esp. one enforceable under legal penalty; a written contract or bond

The word "responsibility" is given, *inter alia*, the following meaning at p. 1173 of the same book:

the person or thing for which one is responsible (the food is my responsibility)

The word "responsible" is given, *inter alia*, the following meaning at p. 1173 the same book:

liable to be called to account (to a person or for a thing)

Clauses 3 and 5 of the Time Charter provide as follows:

3. Charterers shall pay for the use and hire of the said Vessel at the following daily rates as shown below, payable in Malaysian currency, commencing on and from the day of her delivery, as aforesaid, and at and after the same rate of any part of a month; hire shall continue until the hour of the day of her redelivery in like good order and condition, ordinary ware and tear excepted, to the Owners (unless Vessel lost) at Singapore unless other wise mutually agreed. Charterers shall give Owners not less than 30 days notice of Vessel's expected date of redelivery and probable port.

Hire Period	Daily Hire Rate Payable
Years 1-5	Malaysian Ringgit Seventeen Thousand and Fifteen (RM17,015.00)

The above Daily Hire Rate is comprised of three components as follows:

Time Charter Element	: RM13,500.00
Bunker Component	: RM2,640.00
Port Charges Element	: RM875.00

5. **Payment of hire shall be made** so as to be received by Owners in Kuala Lumpur in Malaysian Currency, at such bank and into such account as shall be advised by PFS from time to time, in funds available to the Owners on the due date, **monthly in advance**, together with any additional amounts due by Charterers to Owners for which valid invoices have been submitted not less than 7 days prior to the last working day of the month. Hire payment for the last month or part of same shall be the approximate amount of hire, and should same not cover the actual time, hire shall be paid for the balance day by day as it becomes due, if so required by Owners. *Failing the punctual and regular payment of the hire, or on any breach of this Charter Party, the Owners shall be at liberty to withdraw the Vessel from the service of the Charterers without prejudice to any claims the Owners may otherwise have on the Charterers.*

The Charterers shall be jointly and severally liable for the performance under this Charter Party and as a further additional security for their due performance shall provide a continuing Bank Guarantee issued by a first class bank and in a form acceptable to the Owners for a sum representing 90 days hire. **The Bank Guarantee shall be maintained by Charterers for 5 years and shall be issued simultaneously with the execution of this Charter Party**. (Emphasis added.)

In *Stroud's Judicial Dictionary of Words and Phrases*, 6th edn, vol. 2 at p. 1111, the word "guarantee" is given the following meaning:

> A guarantee is a collateral engagement to answer for the debt, default, or miscarriage of another person" (De Colyar on Guarantees: see ANOTHER). It has been said that "a guarantee is a promise to another as creditor to secure the payment of a debt payable to him: whereas an indemnity is a promise to another as debtor to secure the repayment of a debt payable by him" (38 S.J. 577).

On the issue of what is the liability of the defendant under the corporate guarantee, the following excerpt from *Halsbury's Laws of England*, 4th edn, Reissue, vol. 20, p. 115, para 18 is relevant:

> Secondary liability of the guarantor. There are two different kinds of guarantee. One is a promise by the guarantor which becomes effective if the principal debtor fails to perform his obligations. The other is a promise that the principal debtor will perform his obligations. In both cases, the guarantor's liability is secondary. The guarantor is under no liability if the principal debtor's obligation is discharged, by performance or otherwise, on or before the date of performance. In the one case the conditional promise never becomes effective; in the other, there is no breach by the guarantor.

In the present case, the corporate guarantee would appear to fall within the first category of guarantee since the defendant is being sued by the plaintiff for losses incurred by the plaintiff as a result of the breach of the Time Charter by PMI and EPL who are the principal debtors.

On the issue of whether the arbitration award of RM12.1m which has been handed down against PMI and EPL is proof of the defendant's liability as guarantor under the corporate guarantee the following paragraph from the same book is relevant:

> 181.1 Evidence of guarantor's liability. In an action against the guarantor by the creditor, a judgment or award obtained by the creditor against the principal debtor is not evidence against the guarantor. This is so even if the arbitration award arises from an arbitration clause in the contract which contains the obligations of the principal debtor which are the subject of the guarantee. However, such a judgment or award may bind the guarantor if the guarantee on its construction covers the liability of the principal debtor arising from the judgment or award itself.

In the case of *Compania Sudamericana de Fletes S.A. v. African Continental Bank Ltd, The Rosarina* [1973] Lloyd's Rep 21 the plaintiff, the owner of the vessel known as 'Rosarino', chartered her to one E. line for 12 months, one more or less in the charterer's option. The charter also incorporated an arbitration clause providing for disputes to be referred for arbitration. Subsequently, the defendant guarantor issued a letter of guarantee to the plaintiff which provided, *inter alia*, as follows:

> ... we guarantee as Surety and Guarantor for [E. Line] the due fulfillment of any obligation and the full and total payment without discount up to an amount not exceeding Pound 13,200 sterling ... on Delivery due to ... [the plaintiffs]. Furthermore, we promise to fulfil and pay as Surety up to the amount stated above in accordance with any arbitration award rendered in London according to Clauses 23 and 24 of the above Time Charter ... This guarantee covers only one month hire ... This guarantee commences 23rd June, 1966 and expires 23rd June, 1967.

Disputes subsequently arose between the plaintiff and the charterers and were referred for arbitration. An award was made that the charterers should pay to the plaintiff British Pound 3,712.75 with interest. The charterers were ordered to pay the costs of the award.

The charterers having failed to honour the arbitration award, the plaintiffs sued the defendant guarantor.

His Lordship Mocatta J decided, applying *Bremer Oeltransport GmbH v. Drewry* [1933] 1 KB 753, CA, that the obligation on a party to a contract containing an arbitration clause to meet an award made in an arbitration held under that clause was an obligation which arose out of the agreement and that, therefore, the defendant guarantor was liable under the first sentence of the guarantee and that the second sentence of the guarantee which contained a separate promise to "pay as surety ... in accordance with any arbitration award"

was to remove any doubt there may be (although in his opinion there was none) in relation to the obligation of the defendant guarantor from the first sentence.

The approach which the court should take in this case has been set out in para. 184, at p. 118 of *Halsbury's Laws of England*, 4th edn, Reissue, vol. 20, under the heading "Ascertaining the extent of liability" as follows:

> The extent of the liability undertaken by the guarantor will depend upon the terms of the contract of guarantee ... . In order to ascertain the extent of the guarantor's liability, if any to the creditor, it is first necessary to determine the amount and nature of the principal debtor's debt to the creditor and the circumstances in which it has arisen. This having been done, the contract of guarantee should then be construed strictly to see whether it covers the nature, extent and circumstances of the principal debt sought to be recovered from the guarantor.

Applying this approach to the facts of the present case as disclosed in the pleadings and the affidavit evidence and in the light of the decided cases the court makes the following observations:

(a) it is not disputed that there is a valid contract between the plaintiff and PMI and EPL, the charterers and also the principal debtors, as evidenced by the Time Charter and the assignment;

(b) it is also not disputed that under cl. 3 of the Time Charter, PMI and EPL, are under an obligation to pay a daily rate of hire of RM17,015 including fuel and port charges for the use and hire of the Vessel for the hire period of five years;

(c) under cl. 5 of the Time Charter, such payment shall be made monthly in advance and upon the failure of PMI and EPL to pay the hire punctually or if there is any breach of the Time Charter the plaintiff shall be at liberty to withdraw the Vessel without prejudice to any claims the plaintiff may have against PMI and EPL;

(d) it is also provided under cl. 5 of the Time Charter, that PMI and EPL shall provide, as a further additional security for their due performance under the Time Charter, a continuing bank guarantee issued by a first class bank and in a form acceptable to the plaintiff for a sum representing 90 days hire and this bank guarantee shall be maintained by PMI and EPL for five years and shall be issued simultaneously with the execution of the Time Charter;

(e) it is also not disputed that there has been a failure by PMI and EPL to pay the daily hire to the plaintiff before the Vessel was withdrawn by the plaintiff;

(f) it would appear that the payment of the daily hire, the cash outlay consequential on the lay-up of the Vessel, the loss of profit and the accrued interest pursuant to the provisions of the Time Charter are the responsibilities and obligations of PMI and EPL;

(g) it is not disputed that the defendant has given a corporate guarantee to "guarantee the fulfillment of all responsibilities and obligations of PMI and EPL as stipulated in the Time Charter until such time as the requisite valid guarantee issued in favour of DRSB (the defendant) is obtained by PMI and EPL and furnished to DRSB" whereupon "the corporate guarantee shall then expire and be of no further effect";

(h) it would appear that the corporate guarantee is unlimited in amount unlike the bank guarantee envisaged by cl. 5 of the Time Charter which limits the amount to 90 days of hire (ie 90 x RM17,015 = RM1,531,350) and that pursuant to the terms of the corporate guarantee the defendant is liable to the plaintiff for the items mentioned in sub-para. (f) above;

(i) it would appear that the defendant had given to the plaintiff the corporate guarantee in consideration of the plaintiff releasing the Vessel to PMI and EPL;

(j) it would appear that the Maybank guarantee is ineffective in discharging the defendant from their liabilities under the corporate guarantee because it was given to the plaintiff after the plaintiff had terminated the Time Charter by withdrawing the vessel by which time the liabilities of the defendant had crystallised;

(k) there is a clause in the Time Charter which provides for disputes to be referred for arbitration;

(l) the plaintiff's claim against PMI and EPL had been referred for arbitration;

(m) PMI and EPL were legally represented during the arbitration proceedings; and

(n) the arbitrators have handed down their award in favour of the plaintiff against the defendant for the sum of RM12.1 million.

In view of the above although there is nothing in the corporate guarantee which expressly provides that the defendant is bound by the arbitration award, the court is satisfied based on the pleadings, the affidavit evidence of the plaintiff

and the defendant and in the light of the decided cases *viz* the *"Vasso"* and the *"Rosarino" (supra)* that the plaintiff's claim against the defendant would appear to be well founded and that the plaintiff has shown a good arguable case against the defendant for the amount of RM12.1 million as claimed by the plaintiff in its writ of summons and statement of claim (enc. 1). A *fortiori,* the plaintiff has crossed the threshold for the exercise of the jurisdiction for the grant of a Mareva injunction.

Whether Defendant Has Assets Within The Jurisdiction

The law

The plaintiff must prove that there are assets belonging to the defendant which the Mareva can freeze.

The Plaintiff's Case

The plaintiff has not shown by affidavit evidence the existence of such assets.

The Defendant's Case

Although there is no duty on the defendant to disclose its assets the defendant has exhibited its audited accounts for the year ending 31 December 1999 (exh. "OLS1", affidavit of Ooi Leong Seng, the defendant's project coordinator affirmed on 30 October 2000 (encl. 18)) showing that the defendant has assets within the jurisdiction of the court and it is doing well.

The Findings Of The Court

Based on the audited accounts as exhibited by the defendant, the court is satisfied that the second ingredient for the grant of a Mareva injunction is present.

Whether There Is A Real Risk Of Dissipation

The law

It is the fundamental aim of the Mareva that it is to prevent the defendant from frustrating any judgment that may be obtained by the dissipation of its assets. Before the court will grant the Mareva injunction the plaintiff must satisfy the court that there is dissipation or a real risk that dissipation will occur.

In the *Ninemia Corp* case *(supra),* his Lordship Mustill J had traced the development of this principle of law.

In para. e at p. 404 under the same sub-heading he said as follows:

Dissipation of assets

It may be useful to start with a series of citations. First there is the case from which the Mareva Jurisdiction derives its name, *Mareva Compania Naviera SA v. International Bulkcarriers SA, The Mareva (1975)* [1980] I All ER 213 at 215 per Lord Denning MR:

> [There is jurisdiction to grant an injunction if] there is a danger that the debtor may dispose of his assets so as to defeat [the debt] before judgment.

In *Rasu Maritima SA v. Pertamina Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina,) and Government of Indonesia (as interveners)* [1977] 3 All ER 324 at 334 [1978] QB 644 at 660-661 Lord Denning MR (approving Kerr J) said:

> ... on being apprised of the proceedings, the defendant is liable to remove his assets, thereby precluding the plaintiff in advance from enjoying the fruits of a judgment which appears irresistible on the evidence before the court. The defendant can then largely ignore the plaintiff's claim in the courts of this country and snap his fingers at any judgment which may be given against him.

In *Establishment Esefka International Anstalt v. Central Bank of Negeria* [1976] 1 Lloyd's Rep 445 at 448 Lord Denning MR said:

> [The jurisdiction exists] where there is danger of the money being taken out of the jurisdiction so that if the plaintiffs succeed they are not likely to get their money.

Brandon LJ said (at 449):

> [The jurisdiction exists where] the assets of the defendants are likely to be removed from the jurisdiction so as to avoid payment of any judgment which the plaintiffs might obtain.

In *Iraqi Ministry of Defence v. Arcepey Shipping Co SA (Gillespie Bros & Co Ltd intervening), The Angel Bell* [1980] 1 All ER 480 at 485-486, [1981] QB 65 at 71-72 Robert Goff J rejected a submission that the purpose of the jurisdiction is 'to freeze a foreign defendant's assets in this country to ensure that there is a fund available in this country from which the plaintiff will be able to satisfy a judgment'. Robert Goff J went on to say that the purpose of the jurisdiction was not to rewrite the law of insolvency:

> ... but simply to prevent the injustice of a foreign defendant removing his assets from the jurisdiction which might otherwise have been available to satisfy a judgment.

In *Third Chandris Shipping Corp v. Unimarine SA, The Pythia, The Angelic Wings, The Genie* [1979] 2 All ER 972 at 985, [1979] QB 645 at p. 669 Lord Denning MR said:

> **The plaintiff should give some grounds for believing that there is a risk of the assets being removed before the judgment or award is satisfied.** The mere fact that the defendant is abroad is not by itself sufficient. No one would wish any reputable foreign company to be plagued with a Mareva injunction simply because it has agreed to London Arbitration. But there are some foreign companies whose structure invites comment. We often see in this court a corporation which is registered in a country where the company law is so loose that nothing is known about it, where it does not work and has no officers and no assets. Nothing can be found out about the membership, or its control, or its assets, or the charges on them. Judgment cannot be enforced against it. There is no reciprocal enforcement of judgments. It is nothing more than a name grasped from the air, as elusive as the Cheshire cat. In such cases the very fact of incorporation there gives some ground for believing there is a risk that, if judgment or an award is obtained, it may go unsatisfied ... Other grounds may be shown for believing there is a risk. But some such should be shown. (Emphasis added.)

Lawton LJ said ([1979] 2 All ER 972 at 987, [1979] QB 645 at 671-672):

> The mere fact that a defendant having assets within the jurisdiction.., is a foreigner or a foreign corporation cannot, in my judgment, by itself justify the granting of a Mareva injunction. **There must be facts from which the Commercial Court, like a prudent, sensible commercial man, can properly infer a danger of default if assets are removed from the jurisdiction**... [The judges of the Commercial Court] have special experience of commercial cases and they can be expected to identify likely debt dodgers as well as, probably better than, most businessmen. **They should not expect to be given proof of previous defaults or specific incidents of commercial malpractice**. Further, they should remember that affidavits asserting belief in, or the fear of, likely default have no probative value unless the sources and grounds thereof are set out ... *In my judgment an affidavit in support of a Mareva injunction should give enough particulars of the plaintiffs case to enable the court to assess its strength and should set out what enquiries have been made about the defendant's business and what information has been revealed, including that relating to its size, origins, business domicile, the location of its known assets and the circumstances in which the dispute has arisen*. These facts should enable a commercial judge to infer whether there is likely to be any real risk of default. **Default is most unlikely if the defendan**t is a long-established, well-known foreign corporation or **is known to have substantial assets in countries where English judgments can easily be enforced** either under the Foreign Judgments (Reciprocal Enforcement) Act 1933 or otherwise. **But**

> **if nothing can be found out about the defendant, that by itself may be enough to justify a Mareva injunction**. (Emphasis added.)

In *Montecchi v. Shimco (UK) Ltd* [1971] WLR 1180 at 1183-1184 Bridge LJ said:

> ... the basis of the Mareva injunction is that there has to be a real reason to apprehend that if the injunction is not made, the intending plaintiff in this country may be deprived of a remedy against the foreign defendant whom he seeks to sue ... . Here, for all we know ... the sellers ... are persons of perfectly sound financial standing ... . If those counterclaims are eventually successful, then they will result in judgments ... which will be enforceable in Italy under the procedure provided by the Foreign Judgments (Reciprocal Enforcement) Act 1933 ...

In *Barclay-Johnson v. Yuill* [1980] 3 All ER 190 at 195, [1980] 1 WLR 1259 Sir Robert Megany V-C said:

> *[For the jurisdiction to exist] it must appear that there is a danger of default if the assets are removed from the jurisdiction. Even if the risk of removal is great, no Mareva injunction should be granted unless there is also a danger of default.* (Emphasis added.)

In *Prince Abdul Rahman Bin Turki Al Sudairy v. Abu-Taha* [1980] 3 All ER 409 at 412, [1980] 1 WLR 1268 at 1273 Lord Denning MR said:

> [An injunction may be granted against a resident of the United Kingdom] if the circumstances are such that there is a danger of his absconding, or a danger of his assets being removed out of the jurisdiction or disposed of within the jurisdiction, or otherwise dealt with so that there is a danger that the plaintiff, if he gets judgment, will not be able to get it satisfied.

In *Z Ltd v. A* [1982] 1 All ER 556 at 561, [1982] QB 558 at 571 Lord Denning MR said:

> The Mareva jurisdiction extends to cases where there is a danger that the assets will be dissipated in this country as well as by removal out of the jurisdiction.

Kerr LJ said ([1982] 1 All ER 556 at 571-572, [1982] QB 558-586):

> *[It is an abuse to use the jurisdiction] in circumstances where there may be no real danger of the defendant dissipating his assets to make himself "judgment-proof' ... [Relief should only be granted where there are] reasons to believe that the defendant has assets within the jurisdiction to meet the judgment, in whole or in part, but may well take steps designed to ensure that these are no longer available or traceable when judgment is given against him ... the great value of this jurisdiction must not be debased by allowing it to become something which is invoked simply to obtain security for a judgment in advance, and still less as a means of pressurising defendants into settlements'* (Emphasis added.)

> These dicta must be approached with some caution, for the law and practice on the grant of Mareva injunctions has not stood still since the jurisdiction was first devised. Thus, I believe that it is no longer either necessary or sufficient (if it ever was) to establish that there is a risk that the assets will be taken abroad: although this will, of course, always be a very material consideration. Moreover, most of the passages quoted come from cases on which this particular point was not in issue. This may account for the apparent discrepancy in the authorities as to the necessity for proof that the defendant will deal with his assets with the object, and not just with the effect, of putting them out of the plaintiff's reach.
>
> Nevertheless, certain themes can be seen to run through the cases. It is not enough for the plaintiff to assert a risk that the assets will be dissipated. He must demonstrate this by solid evidence. This evidence may take a number of different forms. It may consist of direct evidence that the defendant has previously acted in a way which shows that his probity is not to be relied on. Or the plaintiff may show what type of company the defendant is (where it is incorporated, what are its corporate structure and assets, and so on) so as to raise an inference that the company is not to be relied on. Or, again, the plaintiff may be able to found his case on the fact that inquiries about the characteristics of the defendant have led to a blank wall. Precisely what form the evidence may take will depend on the particular circumstances of the case. But the evidence must always be there. Mere proof that the company is incorporated abroad, accompanied by the allegation that there are no reachable assets in the United Kingdom apart from those which it is sought to enjoin, will not be enough.

It can be seen from the various cases considered by his Lordship Mustill J that:

(a) originally, the Mareva injunction was applied for by the plaintiff and granted by the court against a foreign defendant when there was also present a danger that the foreign defendant might dispose of his assets so as to defeat the debt before judgment;

(b) subsequently, the English courts did away with the distinction of foreign and non-foreign defendant and the grant of the Mareva injunction was extended to defendants who were not foreigners. However, the danger of removal of his assets from the jurisdiction of the court must appear irresistible on the evidence before the court;

(c) one way of showing such danger is to disclose to the court that the defendant is a foreign corporation which does no work, has no officers and no assets and nothing can be found about the membership, or its control, or its assets, or the charges on them and judgment cannot be enforced against it because there is no reciprocal enforcement of judgments;

(d) another way of showing such danger is if nothing can be found out about the foreign defendant;

(e) it is insufficient to show that the risk of removal is great;

(f) the plaintiff must show that there is a danger of default. The plaintiff can rely on enquiries about the defendant's business and what information it has obtained relating to the defendant's size, origins, business domicile, the location of its own assets and the circumstances in which the dispute has arisen in order to show such danger;

(g) it is an abuse to grant a Mareva injunction to make the defendant "judgment proof" where there may be no real danger of the defendant dissipating his assets;

(h) the jurisdiction of the court to grant a Mareva should not be invoked simply to obtain security for a judgment in advance or as a means to exert pressure on the defendant to settle the plaintiff's claim;

(i) it is insufficient for the plaintiff to assert a risk that the assets will be dissipated; and

(j) he must show this by solid evidence, for example, by adducing direct evidence to show that the defendant has previously acted in a way which shows that its probity is not to be relied on.

In Malaysia, in the first case of *Zainal Abidin Hj Abdul Rahman (supra)* the Federal Court held that an applicant for a Mareva injunction must show evidence that there was a danger that the available assets of the defendant would be dissipated to prejudice the plaintiff's claim. In the second case of *S & F International Limited (supra)*, the Federal Court was satisfied on affidavit evidence that there was a risk of dissipation of the appellant's assets because its corporate structure inferred that it was not to be relied upon.

In *Tansa Enterprise Sdn Bhd v. Temenang Engineering Sdn Bhd (supra)* Haidar J (as his Lordship then was) adopted the approach of Edgar Joseph Jr J (as his Lordship then was) in the case of *Pacific Center Sdn Bhd v. United Engineers (Malaysia) Bhd* [1984] 2 MLJ 143 where the latter had held that it would be sufficient for the plaintiff to merely show a risk of disposal of assets because of the practical difficulty of proving the requisite intent.

The Plaintiff's Case

There is a lack of probity on the part of PMI and EPL in breaching its initial agreement to pay the balance of the hire and in seeking to argue that the plaintiff was in breach of the Time Charter and making a counter claim for USD 19,000,000 which counterclaim has been rejected by the arbitrators. There

is also a lack of probity on the part of PMI and EPL in respect of the arbitration proceedings, ie in refusing to pay the arbitrator's fee and to collect the award and in applying for and obtaining an *ex parte* injunction (which was subsequently set aside) to stop the arbitration proceedings on the ground that their arbitrator had no work permit. PMI has also ceased operations since 1999. Although PMI had a paid up capital of RM7 million, PMI and EPL have no available assets to meet the plaintiff's claim and have refused to disclose their assets.

PMI and EPL have also refused to pay the arbitration award because they are in no financial position to do so.

The corporate veil of PMI and EPL should be lifted in order to impute PMI's and EPL's lack of probity to Dato' Shamsul, the majority shareholder of the defendant because the defendant is a majority shareholder of PMI and EPL. The corporate veil of PMI and EPL should be lifted a second time to impute PMI's and EPL's dishonesty and lack of probity to the defendant because Dato' Shamsul is the controlling mind of the defendant.

There is also an article in the newspaper "The Edge" in which the writer of the article has stated that Dato' Shamsul has stepped down as chairman of Ladang Perbadanan Fima Bhd. and there is speculation that "he (Dato' Shamsul) could be selling his stake in SBSK..." to support its argument that there is a real risk of dissipation.

The Defendant's Case

If the plaintiff can show dishonesty and lack of probity on the part of the defendant no further proof of risk of dissipation is needed. However, the plaintiff has failed to show as follows:

(a) that the acts of PMI and EPL in the arbitration proceedings were dishonest and lacking in probity;

(b) that the corporate veil should be lifted to show that the person actually to be imputed with the dishonesty and lack of probity is that of Dato' Shamsul; and

(c) that the corporate veil can be lifted a second time so that this dishonesty and lack of probity of Dato' Shamsul can be made attributable to SBSK Plantations Sdn Bhd, the defendant in this action.

The Findings Of The Court

Whether PMI And EPL Dishonest And Lacking In Probity

The court is not satisfied on the available evidence that there is dishonesty and a lack of probity on the part of the PMI and EPL. It is manifestly clear from the plaintiff's affidavit evidence that PMI and EPL are not in a financial position to pay the arbitration award. Neither has the plaintiff shown by affidavit evidence that PMI and EPL have assets to pay the arbitration award. The fact that the debtor is impecunious does not make the debtor dishonest. Nor does the refusal of the debtor to pay its debts render its conduct dishonest or lacking in probity.

Here, the fact that PMI had renegaded on its initial agreement to pay the balance of the hire coupled with the fact that it subsequently sought to argue that the plaintiff was in breach of the Time Charter and counter claimed for USD19,000,000 do not themselves make PMI dishonest or lacking in probity as the former merely indicates that PMI is a bad paymaster whilst the latter are acts within its legal rights once disputes have arisen between the contracting parties.

In *Creative Furnishing Sdn Bhd v. Wong Koi* [1989] 2 CLJ 93 the Supreme Court held, at p. 96, that "mere refusal to settle a disputed debt is not evidence of risk of dissipation to pay a disputed debt and issuing of a dishonoured personal cheque by a director of the second defendant (who was not a party in [the] appeal), as presented before the learned judge, fell far too short of the necessary evidence to establish real risk of dissipation of assets of the appellant before judgment."

In *Trade Alliance (S) Pte Ltd v. Sujinder Electronics (Imp & Exp) Pte Ltd* (unreported) 118 MDZ, his Lordship Lee Seiu Kin JC of the Singapore High Court said as follows:

> Failure to pay, even if it was persistent, did not entitle the creditor to invoke the mareva injunction. There had to be evidence that the defendants were about to or there was a real risk that the defendants would dissipate their assets. In the present case, the crime committed by Tommy and his wife did not appear to be related to the transaction in dispute. There was therefore no pattern of dishonest conduct from which it could be inferred that the defendants would be likely to dissipate their assets; ... .

In *Heng Holdings SEA (Pte) Ltd v. Tomongo Shipping Co Ltd* [1997] 3 SLR 547, one of the two reasons which influenced the learned trial judge into granting the Mareva injunction against the appellants was the past instances when the appellant's creditors had to resort to execution proceedings against them to recover payment of their debts. In allowing the appellant's appeal that

the Mareva injunction had been wrongly obtained, the Singapore Court of Appeal opined as follows, on p. 562, paras F to G:

> The respondents had shown various instances where the appellants had failed or refused to pay and discharge their debts or liabilities until their creditors put in force execution proceedings. All these, of course, do not speak well of the appellants and show undoubtedly that they are very bad paymasters, and that they are in a habit of not paying or refusing to pay their debts, until the bailiff is at their doorstep with the writs of execution. Nonetheless, all these facts do not give rise to an inference that the appellants would dissipate or were likely to dissipate their assets so as to frustrate any judgment in favour of the respondents.

Further, it is undisputed that although PMI and EPL defaulted on the punctual payment of the hire for the Vessel it took the plaintiff quite some time to withdraw the vessel and terminate the Time Charter. This fact is material because it shows that the plaintiff did not act promptly in enforcing its rights under the Time Charter. In fact when PMI and EPL failed to furnish a continuing bank guarantee for the full five years of the Time Charter before the Vessel was delivered to PMI and EPL the plaintiff should have been put on notice that perhaps all was not well with the financial standing of PMI and EPL; ie its creditworthiness. But it is another thing to say that PMI and EPL have acted dishonestly or there is a lack of probity on their part.

Instead the plaintiff chose to rely on the defendant's corporate guarantee as though it was the complete answer to any claim that the plaintiff may have against PMI and EPL under the Time Charter. This may suggest that the plaintiff had in fact accepted that FMI and EPL may not be as creditworthy as it would have wished. Although the plaintiff has emphasised that PMI and EPL had a paid up capital of RM7 million the plaintiff has not explained why it did not move swiftly to apply for a Mareva injunction against PMI and EPL if it was satisfied that the acts of PMI and EPL were dishonest and lacking in probity. It could be because the plaintiff was unable to show by way of affidavit evidence that PMI's conduct was, in fact, dishonest and lacking in probity and that there was a real risk that it would dissipate its assets. Neither has the plaintiff shown by way of affidavit evidence that PMI had since dissipated the RM7 million paid up capital in order to frustrate the arbitration award.

The court is of the view that the cases cited by the plaintiff *viz Petowa Jaya Sdn Bhd v. Binaan Nasional Sdn Bhd* [1988] 2 MLJ 261; *Ang Chee Huat v. Engelbach Thomas Joseph* [1995] 2 CLJ 893 and *Amixco Asia Pte Ltd v. Bank Negara Indonesia* [1992] 1 SLR 703 are inapplicable because in those cases the plaintiffs were able to satisfy the court on affidavit evidence that the

conduct of the respective defendants was either dishonest or lacking in probity and based on that finding the court concerned had held that there was a real risk that the defendant would dissipate its assets.

Whether The Corporate Veil Should Be Lifted

On the issue whether the corporate veil of PMI and EPL should be lifted the court is of the view that the plaintiff has not discharged the burden of proving that the circumstances leading to the lifting of the corporate veil exist in this case.

The two cases cited by the learned plaintiff's counsel *viz Pek Seng Co Pte Ltd & Ors v. Low Tin Kee & Ors* [1990] 1 MLJ 75 and *Sunrise Sdn Bhd v. First Profile (M) Sdn Bhd* [1997] 1 CLJ 529 do not apply to the present situation because the plaintiff has not adduced evidence of any fraud by the defendant or PMI and EPL whereas in the two cases cited, the courts were motivated to lift the corporate veil because of fraud as the notional separation of the companies was formulated as a means to evade liability. In any event there is no suggestion by the plaintiff that PMI and EPL were formed by the defendant as mechanisms to evade liability by the defendant. Since the defendant is not Dato' Shamsul nor are any of the orders sought by the plaintiff directed at Dato' Shamsul or his personal holdings, the case of *Bank Bumiputra (M) Bhd v. Lorrain Osman & Ors* [1986] 2 MLJ 236, where the trial judge in applying the "alter ego" principle found that there was evidence of risk of disposal of assets by Lorrain Osman, is clearly distinguishable.

Consequently, the court found no reason to depart from the principle of separate legal personalities in order to attribute PMI's and EPL's conduct in the arbitration proceedings to Dato' Shamsul and from Dato' Shamsul to the defendant.

Whether Defendant Has Been Dissipating Its Assets

The undisputed facts show that PMI had defaulted on the Time Charter in 1997. The vessel had been withdrawn in January 1998 and the dispute had been referred to arbitration in 1998. There is no real evidence that the defendant has dissipated its assets although it had ample time and opportunity to do so. On the contrary, the net assets of the defendant, as disclosed in the defendant's audited accounts for the year ending 1999, have increased from RM12,262,430 in 1998 to RM26,575,360 in 1999 with profits rising some RM10,000,000 between 1998 to 1999. (See *Petromar Energy Resources Pte Ltd v. Glencore International AG* [1999] 2 SLR 609; *European Grain & Shipping Ltd v. Compania Naviera SA & Ors* [1990] 2 MLJ 291 and *Heng Holdings SEA (Pte) Ltd v. Tomongo Shipping Co (supra))*.

In any event the plaintiff has acknowledged that the shares which form the assets of the defendant, ie the shares which the defendant holds in Ladang Perbadanan Fima Bhd, a public listed company, are pledged to the bank. There is, therefore, no risk of the defendant disposing of the shares as they are encumbered.

The court is further of the view that the plaintiff's argument which is founded on an article in the newspaper "The Edge" that there is a risk that the defendant will dissipate its assets is seriously flawed because of four reasons. First, the article makes it clear that it is only speculation. Secondly, the defendant here is SBSK Plantations Sdn Bhd and not Dato' Shamsul. Thirdly, the fact that Dato' Shamsul (who is not the defendant) is selling his stake in the defendant, even if true, is not evidence that the defendant is dissipating its assets. Fourthly, in any event, the Secretary of Ladang Perbadanan Fima Bhd has already issued a general announcement that there is no movement of the significant holdings of SBSK Plantations Sdn Bhd and there is no change in the holdings of the majority shareholders in SBSK Plantations Sdn Bhd.

Whether The Granting Of The Mareva Injunction Would Cause Oppression To The Defendant

As the plaintiff has failed to satisfy the court that there is a real risk that the defendant will dissipate its assets the grant of a Mareva injunction would cause oppression to the defendant as it would interfere with the ordinary business of the defendant.

It has already been established in the earlier part of this judgment that a Mareva should not be used as an instrument of oppression. (See also *Tsoi Ping Kwan v. Loh Lai Ngoh* [1997] 3 CLJ 552; *Larut Consolidated Bhd v. Khoo Ee Bee* [1997] 5 CLJ 307; *Art Trend Ltd v. Blue Dolphin (Pte) Ltd* [1983] 1 CLJ 342; and *Meespierson NV v. Industrial and Commercial Bank of Vietnam* [1998] 2 SLR 632.

Whether Balance Of Convenience Is In Favour Of The Granting Of The Mareva Injunction

The Law

In *Alor Janggus Soon Seng Trading Sdn Bhd v. Sey Hoe Sdn Bhd* [1995] 1 CLJ 461, the Supreme Court affirmed the principle that the grant or refusal of an interlocutory injunction must be decided on the fundamental principle that the court should take whichever course that appears to carry the lower risk of injustice. (See also *American Cyanamid Co v. Ethicon Ltd (supra)*).

In the *Ninemia Corp* case *(supra)* his Lordship Kerr LJ who delivered the judgment of the Court of Appeal had held that the "ultimate test for the exercise of the jurisdiction [to grant the Mareva injunction] is whether in all the circumstances, the case is one which appears to the court 'to be just and convenient' to grant the injunction ... the conduct of the plaintiff may be material ... it must always be remembered that if, or to the extent, that, the grant of a Mareva injunction inflicts hardship on the defendant his legitimate interests must prevail over those of the plaintiff, who seeks to obtain security for a claim which may appear to be well founded but which still remains to be established at the trial."

The Findings Of The Court

Applying the well established principles of law to the facts of the present case the court is of the view that it would be unjust to grant the Mareva injunction as the balance of convenience favours the defendant. The reasons are as follows:

(a) the plaintiff has not fulfilled the requirements of an application for summary judgment under O. 14 of the Rules of the High Court 1980 because when encl. 13 was heard the plaintiff's application for summary judgment had still not been granted;

(b) the plaintiff has applied for the grant of a Mareva injunction based on the ground that it has a good arguable case;

(c) as the plaintiff has failed to establish that there is a real risk of the defendant dissipating its assets, it would appear that the plaintiff is seeking to obtain security for a claim which may appear to be well founded but which still remains to be established at the trial;

(d) the plaintiff has also not adduced any evidence to show that there is a pattern of dishonest conduct on the part of the defendant to enable the court to infer that the defendant would be likely to dissipate its assets;

(e) the plaintiff had relied on the corporate guarantee when releasing the vessel to PMI and EPL for the latter's use under the Time Charter and had been contented to keep the corporate guarantee instead of requiring PMI and EPL to come up with a continuing bank guarantee in accordance with cl. 5 of the Time Charter. The most probable reason is because the plaintiff regarded the corporate guarantee as a better security than a continuing bank guarantee since the corporate guarantee appears to be unlimited in coverage whereas a continuing bank guarantee if furnished will only cover 90 days hire;

(f) damages would be an adequate remedy for the plaintiff since the vessel has already been sold as scrap and the plaintiff's claim is easily quantifiable as evidenced by the plaintiff's statement of claim and the arbitration award handed down by the arbitrators;

(g) damages would not be an adequate remedy for the defendant because it is an on going concern; and

(h) the audited accounts of the defendant show that the defendant is a company which is in sound financial health unlike the plaintiff which has to rely on the undertakings of third parties, ie GMV and Halim Rasip Holdings, thereby impliedly conceding that its own undertaking is not good enough.

Whether There Has Been Delay

The Law

The essence of an application for an interlocutory injunction is that it should be made with promptitude. (See *Alor Janggus Soon Seng Trading Sdn Bhd v. Sey Hoe Sdn Bhd (supra)* at p. 262).

The Findings Of The Court

Clearly, there has been delay on the part of the plaintiff in applying for the Mareva injunction. The writ action was commenced on 12 April 2000 but the Mareva was only applied for in October 2000, ie some six months later. There is no evidence to show that the defendant has dissipated its assets since the plaintiff filed its writ action against the defendant or that events giving rise to a real risk of the defendant doing so arose since the filing of the writ action. This delay has not been explained and is in the circumstances of the case inordinate because the application should have been made at the very latest, at the time of the filing of the writ. (See *Meespierson NV Industrial and Commercial Bank of Vietnam (supra)*; *Hj Wan Habib Syed Mahmud v. Datuk Patinggi Hj Abdul Taib Mahmud* [1986] 2 MLJ 198; and *Larut Consolidated Bhd v. Khoo Ee Bee (supra)*).

In any event, all the circumstances relied on by the plaintiff as constituting evidence of a real risk of dissipation occurred in 1998, 1999 and 2000 and yet the plaintiff only filed the application for a Mareva injunction in October 2000. No satisfactory explanation has been given by the plaintiff for its failure to act promptly. (See *Noor Johan Abdul Wahab v. Md Yusoff Aman Shah & Anor* [1994] 2 CLJ 249).

In the premises the court dismissed the plaintiff's application with costs.